EXHIBIT 6

LOUISIANA PUBLIC SERVICE COMMISSION

ORDER NO. U-23839

KMC TELECOM, INC.
V.
BELLSOUTH TELECOMMUNICATIONS, INC.

Docket No. U-23839 - In Re: Petition of KMC Telecom, Inc. against BST to enforce reciprocal compensation provisions of the Parties' Interconnection Agreement.

(Decided at Open Session held October 13, 1999)

Nature of the Case

KMC Telecom, Inc. ("KMC") and BellSouth Telecommunications, Inc. ("BST") entered into an Interconnection Agreement (the "Agreement") on February 24, 1996 which was deemed approved by the Commission on June 20, 1997. That Agreement calls for the payment of reciprocal compensation for local calls[1] that originate on one company's network which are transported to and terminate on the other company's network. The reciprocal compensation rate is set out in the Agreement and is not at issue in this matter. What is at issue, however, is whether or not reciprocal compensation is owed for a particular type of call. KMC asserts that the parties must pay each other reciprocal compensation for calls that originate on *one* party's network that are directed to Internet service providers ("ISPs") which are located on the other party's network ("ISP traffic"). BST contests KMC's assertion, arguing, inter alia, that ISP traffic does not terminate locally on either party's network and that ISP traffic is interstate, switched exchange access traffic rather than local, and hence no reciprocal compensation is due for these calls.

Jurisdiction

Jurisdiction for the Louisiana Public Service Commission is provided for in the Louisiana Constitution, Article IV, Section 21, which states:

> The commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. It shall

[1]Local calls, as defined by §1.41 of the KMC/BST Interconnection Agreement.

adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties as provided by law.

The Commission has the authority to regulate the service of telephone utilities; its power is sufficiently broad to include adjustment of telephone service to customer needs. South Central Bell Tel. Co. v. Louisiana Public Service Commission, Supp. 1977, 352 So.2d 999. Further, the FCC, in its *Declaratory Ruling*[2] specifically stated, at ¶24, state commissions have the authority to construe "the parties' agreements to determine whether the parties so agreed" to pay reciprocal compensation for ISP-bound traffic.

Additionally, the KMC/BST Interconnection Agreement provides:

> 36.8 Resolution of Disputes: Except as otherwise stated in this Agreement, the Parties agree that if any dispute arises as to the interpretation of the Agreement or as to the proper implementation of this Agreement, the Parties will petition the Commission or the FCC for a resolution of the dispute. However, each Party reserves any right it may have to seek judicial review of any ruling made by the Commission or the FCC concerning this Agreement.

> 36.9 *Governing Law: This Agreement* is subject to the Act, and the effective rules and regulations promulgated pursuant to the Act, and any other applicable federal law, as well as the rules of the Commission, and shall be further governed by and construed in accordance with the domestic law of the state of performance without regard to its conflicts of law principles

Procedural History

KMC Telecom, Inc. ("KMC") filed this proceeding on January 5, 1999 to require BellSouth Telecommunications, Inc. ("BST") to pay reciprocal compensation under the KMC/BST Interconnection Agreement (the "Agreement"). The complaint was published in the Commission's Official Bulletin on January 22, 1999. On February 1, 1999 AT&T Communications of the South Central States, Inc. ("AT&T"), E.spire Communications, Inc. ("E.spire"), and ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") all filed separate pleadings to intervene in this proceeding. Cox Louisiana Telcom II, L.L.C. ("Cox") filed a petition for intervention on February 2, 1999 and then on February 3, 1999 filed a Motion for Leave to File out of Time Intervention. BST's answer was received into the docket

[2] Declaratory Ruling in CC Docket Number 96-98 and Notice of Proposed Rulemaking in CC Docket Number 99-68

on March 1, 1999. BST filed a Motion to Strike Interventions or Alternatively to Limit Participation of Intervenors on March 3, 1999. ITC^DeltaCom and E.spire filed their oppositions to BST's motion on March 10, 1999. AT&T and Cox filed oppositions to BST's motion on March 15, 1999. A ruling was issued on April 12, 1999 which allowed partial participation by intervenors, including participation during potentially dispositive portions of the proceeding. Cox withdrew its request for intervention on April 12, 1999.

ITC^DeltaCom filed a Motion for Summary Judgment on March 17, 1999; KMC also filed a Motion for Summary Judgment on March 18, 1999. After the parties briefed the summary motions, oral argument was heard April 12, 1999. The Administrative Law Judge issued a Ruling denying the motions for summary judgment on May 24, 1999.

Testimony was filed by the parties and the hearing was held on May 26, 1999. Posthearing briefs were filed on August 8, 1999 by KMC, E.spire, BST, and Staff. Posthearing reply briefs were filed by KMC, E.spire, BST, Staff, and AT&T. Further, Leave to File Amicus Briefs was filed by Southeastern Competitive Carriers Association ("SECCA"), Cox, and Advance Tel, Inc. ("EATEL"). Cox had previously intervened in this proceeding, but withdrew its intervention upon the issuance of the Ruling on the Motion to Strike Interventions. SECCA also filed a Motion to Intervene with its Amicus Brief. BST filed a Response to the Motions for Leave to File Amicus Briefs and Opposition to SECCA's Motion for Leave to File Out of Time Interventions on August 25, 1999. Leave to file Amicus Briefs was granted on August 30, 1999. The new participants, SECCA, Cox, and EATEL wished to file responses for the limited purpose of replying to Staff's alleged expansion of the proceeding, and their briefs were accepted into the docket.

A proposed recommendation was issued by the Administrative Law Judge on September 10, 1999. Exceptions to the Proposed Recommendation were filed by Staff and BST on September 24, 1999. Replies to BST's and Staff's Exceptions were filed by KMC, E.spire, and SECCA on October 1, 1999. Cox filed a Reply to Exceptions on October 7, 1999.

Summary of Parties Contentions

KMC's Position

In this proceeding, KMC seeks to require BST to pay reciprocal compensation to KMC for calls that originate on BST's network which are directed to ISPs on KMC's network. KMC asserts that payment of reciprocal compensation for ISP-bound traffic is due under the KMC-BST Interconnection Agreement (hereinafter referred to as the "Agreement"), while BST argues that the Agreement does not require reciprocal compensation for this type of traffic.

KMC first asserts that ISP-bound calls have historically been treated by the FCC as local calls, thereby making the calls eligible for reciprocal compensation. KMC uses the 1996 Telecommunications Act (the "Act") and subsequent FCC orders to interpret the reciprocal compensation provisions of the Agreement. KMC especially points to the portions of the FCC's Declaratory Ruling in CC Docket Number 96-98 and Notice of Proposed Rulemaking in CC Docket Number 99-68 (the "*Declaratory Ruling*") wherein the FCC noted ISP traffic historically had been treated as local traffic and allowed state commissions to continue to interpret interconnection agreements. KMC urges that the *Declaratory Ruling* (at ¶23) states that the FCC has treated ISP-bound traffic as though it were local, and the FCC's statement that the traffic is jurisdictionally mixed does not affect the regulatory treatment state commissions may give the traffic. KMC argues that the FCC has, since at least 1983, exempted ISPs from paying interstate access charges. Further, KMC asserts that ISPs pay local rates and ILECs [incumbent local exchange carrier] treat expenses and revenues related to ISP's as local expenses and revenues. KMC also points to the language of ¶25 of the *Declaratory Ruling*, which states that the FCC's "policy of treating ISP-bound traffic as local for the purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic." KMC argues that this passage demonstrates that BST must pay reciprocal compensation for calls from BST customers to ISPs on KMC's network. Finally, KMC points to the multiple factors the FCC set out for state commissions' consideration for analyzing interconnection agreements (found in ¶24 of the *Declaratory Ruling*) for the Commission's consideration.

KMC further argues that the provisions of the Agreement clearly and unambiguously call for reciprocal compensation. KMC asserts that the agreement provides for two types of traffic only: local and toll. KMC further argues that ISP-bound traffic must fall into one of these two types of traffic, and that type must be local traffic. In support of this contention, KMC points to the Agreement's definition of local traffic (§1.41[3]) and argues that if BST wanted to exclude ISP-bound traffic from this definition, it would have done so. Further, KMC asserts that the industry treats this type of traffic as local, therefore the common understanding was that the definition of "local traffic" would include ISP-bound traffic.

KMC also argues that ISP-bound traffic terminates on KMC's network, at the ISP server. KMC points to the definition of "termination" found in In re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, August 8, 1996, ¶1040, which states that termination is "the switching of local telecommunications traffic at the terminating carrier's end office switch, and delivery of such traffic to the called party's premises." Thus, KMC argues, under the FCC definition, the call terminates at the ISP. Further supporting its contention that BST itself treats calls as terminating at the ISP server, KMC points to the 1997 Memorandum from Mr. Bush at BST to all CLECs [competitive local exchange carrier] to inform CLECs that BST would not be paying ISP traffic reciprocal compensation. BST refers to traffic terminating at the ISP server. KMC asserts that if there truly was a need to send this Memorandum to clarify BST's position on the ISP traffic reciprocal

[3] 1.41: "Local Traffic" refers to calls between two or more Telephone Exchange service users where both Telephone Exchange Services bear NPA-NXX designations associated with the same local calling area of the incumbent LEC or other authorized area (e.g. Extended Area Service Zones in adjacent local calling areas). Local traffic includes the traffic types that have been traditionally referred to as "local calling" and as "extended area service (EAS)." All other traffic that originates and terminates between end users within the LATA is toll traffic. In no event shall the Local Traffic area for purposes of local call termination billing between the parties be decreased.

compensation issue, then there was some expectation that ISP-bound traffic would receive compensation

KMC contends that the obligation of BST to pay reciprocal compensation on ISP-bound traffic is found in the Agreement. However, KMC asserts that extrinsic evidence additionally shows that reciprocal compensation is owed so that BST's argument that compensating for ISP-bound traffic would cost BST too much is unavailing. KMC also argues that courts cannot amend or annul a contract to avoid some alleged hardship to a party. KMC replies to BST's argument that there was no meeting of the minds regarding reciprocal compensation by urging that BST is misconstruing Louisiana contract interpretation law. KMC asserts that whether or not there was a meeting of the minds goes to whether or not a contract was formed, relating to offer and acceptance. In this proceeding, KMC urges, the dispute is not if a contract was formed but what the contract says--contract interpretation. KMC, citing C.C. Art. 2054, argues that if the contract is silent on a point, then the parties to the contract are bound to what law, equity, and usage determine should be the outcome.

KMC further states that if BST is not obligated to pay reciprocal compensation, absurd consequences will result in that BST would not have to pay for services rendered to it by KMC. KMC asserts that even if the Commission believes there was no meeting of the minds regarding the payment of reciprocal compensation, the doctrine of unjust enrichment calls for BST to pay for the services rendered.

BST's Position

BST asserts that the only issue before the Commission is whether or not BST and KMC shared a common intent to pay reciprocal compensation for ISP-bound traffic under the Agreement. BST contends that the parties did not so intend, and that it should not be obligated to do so now.

BST first frames its argument in terms of what is required of ILECs under the Telecommunications Act of 1996. BST cites the portions of the Act, 47 USC 252 (d)(2), which provide for reciprocal compensation for local traffic. BST contends that calls to ISPs do not constitute local traffic, nor terminate at the ISP server, therefore there is no reciprocal compensation obligation for this traffic owed to KMC.

BST argues that because the FCC stated in the *Declaratory Ruling* that ISP-bound traffic is largely interstate, that traffic is not subject to reciprocal compensation. Further, BST asserts, ISP traffic is subject to the FCC's regulation governing the transport and termination of interstate or intrastate interexchange traffic. Therefore, to be subject to federal regulation, the traffic cannot be completely local.

BST also cites portions of the *Declaratory Ruling* wherein the FCC discusses the nature of the call from an end user to an ISP. BST asserts that in ¶12-13, the FCC states that the nature of the call is analyzed by looking at the end-to-end communication, and the call is not broken down into pieces. Therefore, the ends of ISP-bound traffic are the end user and the remote Internet site--not the ISP server, as the call goes through the server to the Internet site. Using this argument, BST asserts that ISP-bound calls do not terminate at the ISP server, but actually terminates at the Internet site accessed, wherever that site may be. Following this argument, BST contends that ISP-bound traffic is interstate, not local, and thus not subject to the reciprocal compensation obligation of the KMC Agreement.

BST states that ISPs use the LEC's local network to institute calls by and to ISP and user customers. BST asserts that the FCC has stated that the portion of the call that is from the LEC to the ISP is interstate in nature. Typically, there is an interstate access charge assessed by ILECs to LECs for interstate calls. However, the FCC exempted ESP calls from the access charge in the early 1980's to promote the growth of the ESP industry. BST asserts that though the exemption results in the treatment of certain aspects of ISP-bound traffic as local, the fact that the FCC had to exempt it shows that the traffic is not truly local.

BST states that the Act does not require reciprocal compensation when a call originates on one LEC's network and terminates on a remote Internet site.

However, the FCC stated there are circumstances where state commissions may find reciprocal compensation is owed: 1) Where parties have agreed to reciprocal compensation and 2) Where the state commission arbitrates the agreement. In this instance, the Commission did not arbitrate the Agreement; rather, KMC and BST came to an Agreement. BST asserts that the Agreement does not provide for reciprocal compensation for ISP-bound traffic.

BST argues that ISP traffic has always been interstate in nature, and if there is any doubt regarding this designation, the law at the time of entering the Agreement controls. BST asserts that the legal understanding at the time the contract was entered into was that the FCC treated ISP-bound traffic as non-local for some purposes. Further, BST asserts that KMC bears the burden of proving the existence of an obligation under the Agreement. To do so, argues BST, KMC must prove that ISP-bound calls are transported by KMC, are terminated on KMC's network, and are local.

BST cites many provisions of the Louisiana Civil Code regarding contract interpretation, using these rules to argue KMC did not carry its burden of proving that parties shares a common intent to pay reciprocal compensation for non-local ISP-bound traffic. Further, BST asserts KMC did not provide any compelling extrinsic evidence regarding intent, as KMC Witness Ms. Breckenridge stated that KMC did not negotiate the contract but merely opted into a contract that was negotiated by some other company. BST also cites the testimony of Ms. Breckenridge to show that KMC did not specifically consider reciprocal compensation at the time KMC opted into the Agreement.

BST argues that KMC's complaint stems solely from the mistaken belief that calls from the end user to the ISP are local and terminate at the ISP server. Further, BST argues that KMC mistakenly believes that reciprocal compensation is required under the Act. BST asserts KMC's witness Breckenridge could not point to any FCC language that stated ISP-bound calls terminate at the ISP server for purposes of reciprocal compensation.

BST urges that KMC must take the Agreement that it opted into as KMC finds it. Further, BST asserts that under Louisiana contract law, the contract must be interpreted against the obligee (KMC) and in favor of the obligor (BST) when a dispute arises. Additionally, BST addressed the application of the FCC factors regarding interpretation of the Agreement. To this point, BST argued that the *factors set forth are only illustrative. Furthermore*, BST asserts that *many of the* factors suggested by the FCC already have FCC rules regarding the factors, calling for LECs to treat the ISP-calls in certain ways. Therefore, BST argues, these factors cannot be used to prove intent of BST.

BST argues that the other state commissions' decisions that KMC cited are not dispositive of this matter. BST asserts that many of the decisions were issued prior to the *Declaratory Ruling* and thus are based on a two-call analysis regarding ISP-bound traffic. The *Declaratory Ruling*, argues BST, did not accept the two-call analysis and any decision based on that analysis must be reconsidered. Additionally, BST argues that some of the cases cited by KMC were arbitrations, and/or the interconnection agreements at issue were not quite the same as the Agreement in this proceeding. Finally, BST argues that those other cases cited by KMC deal with factual circumstances very different from the facts of this particular case.

BST asserts that their witness, Mr. Hendrix, established that at the time of the contract, BST understood ISP-bound traffic was not local. Further, BST did not then and does not now believe the Act mandates reciprocal compensation. BST argues that the definition of "local traffic" in the Agreement does not implicitly include ISP-bound traffic, therefore there was no need to exclude such traffic. Additionally, the ISP-bound traffic does not terminate at the ISP server, argues BST, asserting technical words must be given technical meanings, contrary to KMC's statement. BST also argues that it has never knowingly paid reciprocal compensation for ISP traffic. In support, BST claims that it began holding all reciprocal compensation billings in October of 1995 and identified a process at least as early as January of 1997 to ensure that it did not bill reciprocal compensation on

ISP traffic. BellSouth implemented this process in September of 1997 and wrote off most all prior traffic that it had held.

Finally, BST argues that if it was obligated to pay reciprocal compensation on ISP-bound traffic, that result would be absurd as KMC would then make 338% more revenue from reciprocal compensation than it does from providing service to its 10 ISP customers.

Further, BST asserts that Sections 1.59 and 1.6 of the Agreement are relevant provisions which demonstrate that the parties intended to pay reciprocal compensation only on that traffic which is within the scope of the 1996 Act.[4] BST also argues that ISPs provide Switched Exchange Access Service, therefore such traffic is excluded from reciprocal compensation under Section 1.41 of the Agreement.

BST argues that there is no evidence that KMC is providing a service to BST for which KMC is not being compensated and that KMC is compensated for any such costs in the same manner as BellSouth, from the revenues that it receives from its ISP customers.

Staff's Position

Staff asserts that the FCC has determined that calls to ISPs are to be analyzed as one call, that is, the call that goes from the customer to the ISP to the ultimate Internet site is considered one call. Per this rationale, Staff states that ISP-bound traffic is not subject to state enforcement just because the call is local, for the call is not entirely such. Staff further asserts that the FCC, in the *Declaratory Ruling*, says that state commissions have the power to interpret interconnection agreements, which may bind parties to pay reciprocal compensation for ISP-bound traffic. Thus, Staff contends, the Commission must interpret the Agreement.

Staff maintains that the factors set forth by the FCC in the *Declaratory Ruling* for determining whether or not parties intended to pay reciprocal

[4] 1.59: "Reciprocal Compensation" is as described in the Act, and refers to the payment arrangements that recover costs incurred for the transport and termination of the Telecommunications traffic originating on one Party's network and terminating on the other Party's network.

1.6: "As Described in the Act" means as described in or required by the Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Commission.

compensation for calls to ISPs are illustrative only, and the state commissions are the ultimate arbiters of what factors are relevant to interpreting parties' intentions. Staff states that in examining the intent of KMC and BST, it is not within the province of the court to make new contracts for the parties, and the court is confined to only interpreting the agreement between the parties. Staff concludes that given the evidence presented at the hearing, KMC and BST had different intentions when entering into the Agreement. Therefore, Staff urges, there was no meeting of the minds, or alike understanding, which is necessary for a valid contract. Ultimately, Staff argues, reciprocal compensation is not owed under the Agreement because KMC and BST did not share an understanding of the treatment of ISP-bound traffic.

Staff further asserts that KMC bears the burden of proof in this proceeding and must prove that the parties intended for reciprocal compensation to be owed for ISP-bound traffic. Staff argues that KMC has not carried its burden of proof and KMC put on an insufficient amount of direct or extrinsic evidence to support its claim that the parties mutually agreed to pay reciprocal compensation. Furthermore, Staff states, there were no negotiations in the reaching of the Agreement, as KMC only opted into an existing Interconnection Agreement. Staff points to the testimony of KMC's witness, Ms. Breckenridge, wherein she testified that KMC did not specifically consider reciprocal compensation. Staff asserts that her testimony proves there was no meeting of the minds regarding the issue of reciprocal compensation for calls to ISPs.

Staff also took a stance on policy issues surrounding reciprocal compensation. Staff asserts that the Commission's duty is to promote efficient entry by new providers into the local exchange market. Staff maintains that the unqualified payment of reciprocal compensation does not promote real competition. Staff argues that to follow KMC's prayed for result, all that would result would be cost shifting, taking money from one source and shifting it to another, which does not bring about a true increase in competition. Finally, staff urged that reciprocal compensation is not owed by BST to KMC for ISP-bound traffic.

Staff filed two brief exceptions to the Proposed Recommendation. Staff, like

BST, asserts that KMC properly has the burden of proof at hearing because KMC is demanding performance of the contract. Staff, also like BST, asserts that it objects to the classification of the Agreement as a standard form because no party raised such issue at hearing. Further, Staff urges that KMC came to the negotiating table with BST with the Agreement, therefore if the Agreement is standard form, it is KMC's standard form.

Intervenors' Positions

Intervenors, E.spire, Cox, EATEL, AT&T and SECCA, through their individual filings adopted the positions and arguments expressed by KMC. Intervenors also urged the Commission to expressly limit its decision in this proceeding to the dispute regarding the KMC/BST Interconnection Agreement.

Factual Findings

1. KMC and BST both provide local exchange services in Louisiana. BST is the incumbent local service provider. KMC has two switches within Louisiana, a Shreveport switch which became operational in November, 1997, and a Baton Rouge switch which became operational in December of 1997. (Tr. Breckenridge at 19, 57)

2. Under Section 901.D of the Louisiana Public Service Commission's Competition Regulations, local exchange carriers are required to interconnect their networks, to transport and terminate local traffic exchanged on those networks, and to make arrangements for mutual compensation for providing transport and termination services.

3. KMC and BST signed an interconnection agreement February 24, 1997 ("Agreement"). The Agreement is a regional agreement between KMC and BST in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee. (Agreement at 1)

4. In accordance with provisions of Section 252(i) of the Telecommunications Act of 1996, KMC opted into an existing agreement between Metropolitan Fiber Systems and BST. Therefore, the parties did not negotiate the terms of the Agreement in the traditional sense; there were no meetings to hammer out terms of the Agreement between KMC and BST. (Tr. Breckenridge at 27)

5. The Agreement was submitted to the LPSC for review, and approved by the Commission in Order Number U-22404, issued June 20, 1997, pursuant to USC 252(e). No other determination was made with regard to the provisions contained in either 47 USC 251 or 47 USC 271.

6. A series of amendments to the Agreement have been filed. In each instance the Commission did not specifically approve the Agreement; rather, the Commission published the application, allowed the 90 days to elapse, and

with no interventions having been received, the agreement was "deemed" approved pursuant to 47 USC 252(1). Dates of Commission letters responding to amendment requests are April 3, 1998; April 17, 1998; July 20, 1998; October 19, 1998; November 5, 1998; January 12, 1999; May 17, 1999.

7. Section 5.8 of the Agreement sets forth the following terms regarding the obligation of the parties to pay reciprocal compensation:

5.8.1 Reciprocal Compensation applies for transport and termination of local traffic (including EAS and EAS-like traffic) billable by BST or KMC when a Telephone Exchange Service Customer originates on BST's or KMC's network for termination on the other Party's network.

5.8.2 The parties shall compensate each other for transport and termination of Local traffic (local call termination) at a single identical, reciprocal and equal rate as set forth in Exhibit 8. [The rate is $0.009 per minute.]

5.8.3 The Reciprocal Compensation arrangements set forth in this Agreement are not applicable to Switched Exchange Access Service. All Switched Exchange Access Service and all IntraLATA Toll Traffic shall continue to be governed by the terms and conditions of the applicable federal and state tariffs.

8. The Agreement provides the following definitions of certain key terms:

Section 1.59: "Reciprocal Compensation" is As Described in the Act, and refers to the payment arrangements that recover costs incurred for the transport and termination of Telecommunications traffic originating one Party's network and terminating on the other Party's network.

Section 1.6: "As Described in the Act" means as described in or required by the Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Commission.

Section 1.41: "Local Traffic" refers to calls between two or more Telephone Exchange service users where both Telephone Exchange Services bear NPA-NXX designations associated with the same local calling area of the incumbent LEC or other authorized area (e.g., Extended Area Service Zones in adjacent local calling areas). Local traffic includes the traffic types that have been traditionally referred to as "local calling" and as "extended area service (EAS)." All other traffic that originates and terminates between end users within the LATA is toll traffic. In no event shall the Local Traffic area for purposes of local call termination billing between the parties be decreased.

Section 1.70: "Telephone Exchange Service" is As Defined in the Act.

Section 1.63: "Switched Exchange Access Service" means the following types of Exchange Access Services: Feature Group A, Feature Group B, Feature Group D, 800/888 access, and 900 access and their successors or similar Switched Exchange Access services.

9. Tricia Breckenridge was the only person at KMC involved in the negotiation of the Agreement with BST. Tricia Breckenridge decided to opt into an agreement previously entered between BST and Metropolitan Fiber Systems, rather than negotiate the terms of an agreement with BellSouth. Ms. Breckenridge did not read the Agreement prior to deciding to opt into it. Further, Ms. Breckenridge was not specifically considering the issue of

reciprocal compensation when she decided to opt into the Agreement. Ms. Breckenridge testified that at the time the Agreement was executed, KMC understood that ISP traffic was treated as local and was included in the Agreement's reciprocal compensation obligations. Post-Hearing Brief at 15, Tr., Breckenridge at 14-16, Prefiled Direct at 7. Ms. Breckenridge was unable, however, to point to any specific language in any rulings or orders that supported her understanding, except when prompted by her counsel.

10. Mr. Jerry Hendrix, the person who executed the Agreement on behalf of BST, testified that BST understood that ISP traffic, like all ESP traffic, is non-local interstate traffic, specifically exchange access traffic. Mr. Hendrix testified that, as such, BST understood that ISP traffic was not subject to the reciprocal compensation obligation contained in Section 252(b)(5) of the 1996 Act. Mr. Hendrix further testified that the Agreement expressly provides that the reciprocal compensation obligation covers only the traffic that is subject to this statutory mandate. Further, Mr. Hendrix testified that the Agreement expressly excludes switched exchange access services from the reciprocal compensation obligation and that the FCC has recognized since the early 1980's that enhanced service providers, of which ISPs are a subset, provide exchange access services. Therefore, the Agreement expressly excludes ISP traffic from the reciprocal compensation obligation contained therein.

11. KMC has billed BST a total of $2,326,464 in reciprocal compensation under the KMC Agreement. Of this amount, BST has paid KMC a total of $165,479 for local, non-ISP, traffic, leaving an outstanding balance of $2,160,985. Cochran Rebuttal at 5.

12. KMC has a total of ten ISP customers being served by its two switches in Louisiana. The amount of reciprocal compensation generated by the traffic flowing to these ten ISP customers approximates the $2,160,985 outstanding reciprocal compensation balance that KMC claims to be owed by BST.

13. KMC generated approximately $636,427 in revenue from providing service to its ten Louisiana ISP customers during the same time period that it billed BST $2,160,985 in reciprocal compensation for traffic to these ten ISP customers.

14. BST began holding all reciprocal compensation billings to CLECs in October of 1995. At least as early as January of 1997, BST identified a process to ensure that ISP traffic would not be included in its reciprocal compensation billings to CLECs. BST implemented this process in September of 1997 and wrote off most all prior reciprocal compensation billings.

15. BST never knowingly billed or paid reciprocal compensation on any non-local traffic, including ISP traffic.

16. ISP traffic does not terminate locally at an ISP server, but rather transits through the ISP server for termination at a distant website, somewhere outside of the local calling area. ISP traffic is, therefore, interstate exchange access traffic that is not subject to the reciprocal compensation obligation contained in Section 252(b)(5) of the Telecommunications Act of 1996.

17. FCC regulations require that ISP traffic be exempted from the access charge regime. Pursuant to this exemption, ISPs are treated as end users for purposes of assessing access charges, and the FCC permits ISPs to purchase their links to the public switched telephone network through intrastate business tariffs rather than through interstate access tariffs. Thus, ISPs

generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices. In addition, incumbent LECs are required to treat expenses and revenue associated with ISP traffic as intrastate for separations purposes.

180 There is no prevailing industry custom of treating ISP traffic as "local" for reciprocal compensation purposes. FCC regulations require that ISPs be treated as end users for only one purpose, the access charge exemption.

190 KMC failed to produce any evidence to support its claim that if it does not receive reciprocal compensation for transporting ISP traffic originating on BellSouth's network, that it will incur otherwise uncompensated costs.

200 ISPs are a subset of Enhanced Service Providers ("ESPs) that utilize interstate switched exchange access services to connect to local exchange company central offices.

FCC's Declaratory Ruling On February 26, 1999, in Common Carrier Docket Number 99-68, the FCC declared that the 1996 Act , 47 U.S.C. sec. 251(b)(5), mandated reciprocal compensation for the transport and termination of *local* traffic *only*. The FCC further held that this mandate does not extend to ISP-bound traffic, because ISP-bound traffic is not local but is interstate for purposes of the 1996 Act's reciprocal compensation provisions. ISP-bound traffic is not subject to state enforcement under the 1996 Act on the grounds that it is local traffic. *See* Declaratory Ruling at ¶ 12 and 26 n.87. The FCC ruling effectively undermined the jurisdictional claim of state utility regulators over ISP-bound traffic.

In ruling in favor of federal versus state regulatory jurisdiction over ISP-bound traffic and in construing 47 U.S.C. sec. 251(b)(5), the FCC focused on the "end-to-end" nature of the Internet communication. The initiating caller or customer is one "end" of the communication, and the terminating "end" is the web or other Internet site called by the customer. The FCC rejected arguments that would segment such traffic into intra- and inter-state portions and thereby also rejected a consequent, artificial segmentation of jurisdiction. Id. at ¶ 11. The FCC noted that it "analyzes the totality of the communication when determining the jurisdictional nature of a communication . . . [and] recognizes the inseparability, for purposes of jurisdictional analysis, of the information service and the underlying telecommunications." Id. at ¶ 13. The FCC considers each such commercial transaction as "one call" "from its inception to its completion" and accordingly rejected the jurisdictional limitation implied by arbitrarily isolating the initial part of the call from the rest of the stream of interstate commerce. Id. at ¶ 11.

In its ruling, however, the FCC did not in itself determine whether reciprocal compensation is due in any particular instance. Rather, the FCC held that parties should be bound by their existing interconnection agreements, as interpreted by state commissions. It found no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of a federal rule establishing an appropriate interstate compensation mechanism.

Analysis

The central issue presented by KMC's complaint is whether KMC and BST shared a common intent (mutually agreed) to pay reciprocal compensation for traffic that originates on the network of one of the parties and is transported to an ISP customer served by the network of the other party (ISP traffic), even though neither the Telecommunications Act of 1996 or any other law or regulation requires the parties to pay reciprocal compensation for ISP-bound traffic. For the reasons stated below, the Louisiana Public Service Commission ("LPSC" or "Commission") finds that KMC and BST do not owe reciprocal compensation for ISP traffic under the terms of their Agreement.

Article 2045 of the Louisiana Civil Code provides that the "[i]nterpretation of a contract is the determination of the common intent of the parties." "When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent." La. Civ. Code art. 2046. "A party who demands performance of an obligation must prove the existence of the obligation." La. Civ. Code art. 1831; *see* Louisiana Gaming Corp. v. Rob's Mini-Mart, Inc, 666 So.2d 1268, 1270 (La. App. 2nd Cir. 1996)("The party claiming rights under the contract bears the burden of proof."); Woodward v. Felts, 573 So.2d 1312, 1315 (La. App. 2d Cir. 1991)("The party who asserts an obligation must prove it by a preponderance of the evidence."). Thus, KMC bears the burden of proving the existence of an obligation on the part of BellSouth to pay reciprocal compensation for ISP traffic under the KMC Agreement.

The provisions of the KMC Agreement provide that the parties are required to pay reciprocal compensation to each other only for the transport and termination of "Local Traffic" as defined in the KMC Agreement, and that "Switched Exchange Access Traffic" is expressly excluded from the terms of that obligation. *See* Factual Findings 7&8. Thus, KMC bore the burden of proving (1) that it "transports" the ISP traffic for which it claims reciprocal compensation, (2) that it "terminates" this ISP traffic on its network, (3) that such traffic falls within the definition of "Local Traffic" as defined in the KMC Agreement, and (4) that such traffic is not "Switched Exchange Access Traffic," as defined in the KMC Agreement.

ISP Traffic Does Not "Terminate" Locally.

One of the major disputes in this matter has been over whether ISP traffic "terminates" locally. When KMC initially filed its Complaint that established this docket, KMC argued that ISP traffic constituted "two components, a telecommunications component and an information services component." Complaint, ¶42. This argument is typically referred to as the "two-call model." KMC argued initially that the telecommunications component "terminated" locally at the ISP server. After the filing of its Complaint, the FCC issued its *Declaratory Ruling* on ISP traffic in which it stated unequivocally that ISP traffic does not terminate locally at the ISP server, but rather continues on to distant websites outside of the local calling area. *See Declaratory Ruling*, ¶12. The FCC based its determination on a consistent line of prior precedent dating back several decades. Further, the FCC expressly considered and rejected the "two-call model," noting that its prior precedent has established a consistent, end-to-end analysis for determining where the call originates and terminates. In the Matter of Southwestern Bell Tel. Co., CC Docket No. 88-180, Order Designating Issues for Investigation, 3 FCC Rcd 2339, 2341 (1988)("[T]he jurisdictional nature of a call is determined by its ultimate origination and termination, and not ... its intermediate routing."

Emphasis added.); BellSouth Memory Call, Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, 7 FCC Rcd 1619, 1620(1992) ("there is a continuous path of communications across state lines between the caller and the voice mail service."); Teleconnect, Teleconnect Co. v. Bell Telephone Co. of Penn., E-88-83, 10 FCC 1626, 1629 (1995), aff'd sub nom. Southwestern Bell Tel. Co. v. FCC, 116 F.3d 593 (D.C. Cir. 1997)("[B]oth court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications. According to these precedents, we regulate an interstate wire communications under the Communications Act from its inception to its completion. [A]n interstate communication does not end at an intermediate switch. . . . The interstate communication itself extends from the inception of a call to its completion, regardless of any intermediate facilities.").

After the issuance of the *Declaratory Ruling*, KMC abandoned its reliance on the "two-call model," and began to argue that for "regulatory purposes" ISP traffic is "treated" as terminating locally. In support of this new argument, KMC relies on general statements in the FCC's *Declaratory Ruling* and ¶1040 of the FCC Interconnection Order, First Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, 11 F.C.C. Rcd. 15499 (August 8, 1996)("FCC Interconnection Order").

The *Declaratory Ruling* provides no support for KMC's claim; the FCC stated expressly that "the communications at issue here do not terminate at the ISP's local server, as CLECs and ISPs contend, but continue to the ultimate destination or destinations, specifically at a Internet website that is often located in another state." *Declaratory Ruling*, ¶12. As further support for the finding that a call has only one point of termination, the FCC recognized that its "conclusion that ISP-bound traffic is largely interstate might cause some state commissions to re-examine their conclusion that reciprocal compensation is due to the extent that those conclusions are based on a finding that this traffic terminates at an ISP server ...."

Id. ¶27. Emphasis added. Thus, it cannot be seriously argued that ISP traffic has more than one point of termination or that it actually does terminate locally at the ISP server, even though the FCC has stated emphatically that it does not.

For these very reasons, it is impossible to square KMC's interpretation of ¶1040 of the FCC Interconnection Order with the findings in the *Declaratory Ruling*. Indeed, if ISP traffic did terminate locally under KMC's interpretation of ¶1040, reciprocal compensation would be owed as a matter of law pursuant to section 251(b)(5) of the 1996 Act. It is undisputed, however, that reciprocal compensation is not required by law for this traffic. *See Declaratory Ruling*, ¶26, n.87 ("[T]he reciprocal compensation requirements of section 251(b)(5) of the Act and Section 51, Subpart H (Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic) of the Commission's rules do not govern inter-carrier compensation for this traffic.").[1]

Finally, KMC points to certain statements made by BellSouth in which it misuses the term "terminates." Such misuses do not affect the interpretation of the Agreement. Article 2047 of Louisiana's Code of Civil Procedure provides that "[w]ords of art and technical terms must be given their technical meaning when the contract involves a technical matter." The termination requirement has only one technical meaning, as recently confirmed by the FCC, and that is the ultimate end point of the communication. Thus, KMC has failed to carry its burden of proving that it actually does "terminate" ISP traffic on its network as is required by the reciprocal compensation obligation of the Agreement.

ISPs Provide Switched Exchange Access Service.

As previously stated, BST and KMC expressly excluded Switched Exchange Access Services from the reciprocal compensation obligation of the KMC Agreement. BST argues that ISPs provide switched exchange access services to

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[1]The FCC Interconnection Order interpreted the scope of the reciprocal compensation obligation:
"We conclude that section 251(b)(5)'s reciprocal compensation obligations should apply only to traffic that originates and terminates within a local calling area. . . .
. . . .
We find that the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to transport or termination of interstate or intrastate interexchange traffic."

their subscribers and that such traffic is therefore expressly excluded from the reciprocal compensation obligation of the Agreement. BST's claims are based upon the prior rulings of the FCC regarding Enhanced Service Providers ("ESPs"), of which ISPs are a subset. *See Declaratory Ruling*, ¶1, n.1. In response, KMC claimed that ISP traffic is not expressly excluded in the Agreement. Likewise, the Administrative Law Judge did not consider whether ISP traffic is switched exchange access traffic, but rather focused on the fact that a specific ISP exception was not included in the KMC Agreement.

This Commission chooses to consider the actual terms of the KMC Agreement, rather than speculate as to what terms could have been in the KMC Agreement. The FCC has recognized since the inception of the access charge regime that ESPs use switched exchange access services. In the MTS/WATS Market Structure Order, the FCC found that ESPs use interstate access service and exempted ESPs from paying access charges. MTS and WATS Market Structure, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 711 (1983)("Market Structure Order")("Among the variety of users of access service are ... enhanced service providers"). *See also*, Amendments to Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Order, 2 FCC Rcd. 4305, 4306 (1987)(ESPs, "like facilities-based interexchange carriers and resellers, use the local network to provide interstate services"); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Order, 3 FCC Rcd 2631 (1988)(ESP Exemption Order)(FCC refers to "certain classes of exchange access users, including enhanced service providers").

The FCC confirmed the status of those services provided by ESPs, including ISPs, in its recent *Declaratory Ruling*: "Although the Commission has recognized that enhanced service providers (ESPs), including ISPs, use interstate access services, since 1983 it has exempted ESPs from the payment of certain interstate access charges. . . . Thus, ESPs generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices." *Declaratory Ruling*, ¶5 (Emphasis added).

In light of the above quoted FCC precedent that has found consistently that ISPs use switched exchange access services, such services do fall within the exception contained in Section 5.8.3 of the KMC Agreement. *See* Factual Finding No. 7.

The KMC Agreement Provides that the Parties Intended to do Nothing More Than the 1996 Act Required.

Any doubt as to the parties' intent, as expressed in the KMC Agreement, regarding the scope of the reciprocal compensation obligation is removed by the express statements regarding intent found in Sections 1.59 and 1.6 of that Agreement. *See* Factual Finding No. 8. Given that the parties expressly state that the reciprocal compensation obligation in the Agreement is "as described in or required by the [1996] Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC," it is clear that the parties intended to do nothing more or less than the 1996 Act required. As previously stated, the 1996 Act does not obligate the parties to pay reciprocal compensation for any non-local, interstate traffic. The administrative law judge did not analyze these provisions of the KMC Agreement in reaching the conclusions contained in the proposed and final recommendations.

KMC Failed to Produce Extrinsic Evidence that the Parties Intended to Pay Reciprocal Compensation for ISP traffic.

Even if the terms of the reciprocal compensation obligation of the Agreement were found to be ambiguous, KMC failed to meet its burden of producing sufficient extrinsic evidence to establish that the parties mutually intended to pay reciprocal compensation for non-local, ISP traffic. The only representative of KMC that was responsible for deciding the terms of the interconnection agreement to be entered with BST, Ms. Tricia Breckenridge, testified that (1) neither she nor anyone else at

KMC had any conversations with BST regarding the terms of the interconnection agreement (Hearing Transcript, pp. 24, 27), (2) she chose to opt into an agreement that some other company had negotiated with BST rather than negotiate her own agreement (Id. pp. 27-28), (3) she did not read the agreement that she chose to opt into (Id. p. 29), and (4) she was not looking specifically at reciprocal compensation issues when she was deciding what agreement to opt into. Id.

In light of the sworn testimony of the KMC witness, it is difficult to conceive of how KMC is in a position to claim the benefit of any possible ambiguity in the KMC Agreement, given the cavalier attitude that KMC took in entering the Agreement. Ms. Breckenridge claimed that she relied on various unspecified FCC orders and the fact that BST "treated" ISP traffic as local for other purposes and thus assumed that it would be "treated" as local for purposes of reciprocal compensation. Ms. Breckenridge could not, however, specifically identify what FCC orders she actually relied upon. Even if Ms. Breckenridge was relying upon any specific FCC orders, it is clear that her interpretation of those orders was incorrect.

Not only did BST properly interpret the prior FCC rulings regarding the nature of ISP traffic, BST presented other extrinsic evidence to establish that it never intended to pay reciprocal compensation for non-local, ISP traffic and that it would never have agreed to pay reciprocal compensation for such traffic due to the negative economic consequences that such an arrangement would have ensured.

First, BST presented uncontroverted evidence of the efforts that it undertook to ensure that it did not bill any CLECs reciprocal compensation for ISP traffic, or any other non-local traffic. In October 1995, BST began holding all reciprocal compensation billings to CLECs, including reciprocal compensation billings for local traffic. Prior to entering the KMC Agreement, BST had identified a method to ensure that it would not bill reciprocal compensation for ISP traffic and was working to implement the enhancement to its billing system. This enhancement was implemented in September of 1997, before KMC had even begun billing BST for reciprocal compensation, and BST wrote off most all of the prior traffic that it had withheld from reciprocal compensation billing.

The uncontroverted evidence establishes that BST never knowingly billed or paid reciprocal compensation for ISP traffic. These facts distinguish this case from the numerous other cases upon which KMC cites and relies. Other Regional Bell Operating Companies ("RBOCs") did not undertake any effort to identify or separate out ISP traffic. Indeed, some RBOCs had established a course of conduct of billing and paying reciprocal compensation for several months before informing CLECs that they would no longer pay reciprocal compensation for ISP traffic.

Finally, BST put forth evidence that it would not have agreed to pay reciprocal compensation for ISP traffic because such an arrangement would have certainly resulted in economic harm to BST. Given that CLECs such as KMC primarily, if not exclusively, serve business customers including ISPs, while BST serves the vast majority of Internet end-users, paying reciprocal compensation on ISP traffic would result in absurd amounts of reciprocal compensation flowing to the CLECs. Indeed, in this particular case, KMC billed BST reciprocal compensation for ISP traffic that was approximately 340% more than KMC received in revenue from providing actual service to its ten (10) ISP customers in Louisiana. *See* Factual Findings Nos. 11-13. The negative impact on competition in the local market as well as the potential for abusing the reciprocal compensation obligation from permitting such an arrangement are obvious.

In response, KMC claims that if it does not receive reciprocal compensation for ISP traffic from BST, it will be providing a service to BST for free and will incur certain uncompensated costs. KMC did not put forth any evidence as to the nature or amount of these costs that KMC claimed would go uncompensated and the Commission refuses to simply take KMC's word at face value.

Docket Number U-23839 was considered and decided at the Commission's October 13, 1999 Business and Executive Session. On substitute motion of Commissioner Blossman and seconded by Commissioner Sittig, with Commissioner Dixon concurring and Commissioners Owen and Field dissenting, the Commission voted to reject the Administrative Law Judge's Recommendation and adopted the Staff Recommendation to reject KMC's claim for reciprocal compensation for ISP-bound traffic.

IT IS THEREFORE ORDERED

That KMC's request for payment of reciprocal compensation for ISP-bound traffic is hereby denied.

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA
October 28, 1999

/S/ C. DALE SITTIG
DISTRICT IV
CHAIRMAN C. DALE SITTIG

/S/ JACK "JAY" A. BLOSSMAN, JR.
DISTRICT I
VICE CHAIRMAN JACK "JAY" A. BLOSSMAN, JR.

DON OWEN (DISSENTING)
DISTRICT V
COMMISSIONER DON OWEN

/S/ IRMA MUSE DIXON
DISTRICT III
COMMISSIONER IRMA MUSE DIXON

/S/ LAWRENCE C. ST. BLANC
SECRETARY
LAWRENCE C. ST. BLANC

JAMES M. FIELD (DISSENTING)
DISTRICT II
COMMISSIONER JAMES M. FIELD

EXHIBIT 7

STATE OFNEWJERSEY
Board of Public Utilities
Two Gateway *Center*
Newark, NJ 07102

IN THE MATTER OF THE PETITION OF GLOBAL NAPS INC. FOR ARBITRATION OF INTERCONNECTION RATES, TERMS, CONDITIONS AND RELATED ARRANGEMENTS WITH BELL ATLANTIC-NEW JERSEY, INC. PURSUANT TO SECTION 252(b) OF THE TELECOMMUNICATIONS ACT OF 1996	)	TELECOMMUNICATIONS DECISION AND ORDER DOCKET NO. TO98070426

(SERVICE LIST ATTACHED)

BY THE BOARD:

This Order memorializes final action taken by the New Jersey Board of Public-Utilities (Board) in the arbitration requested by Global NAPs, Inc. (GNI) by letter dated June 30, 1998, and will resolve all outstanding and unresolved issues in GNI's interconnection dispute with Bell Atlantic-New Jersey, Inc. (BA-NJ).

PROCEDURAL HISTORY

On January 26, 1998, GNI requested interconnection and network elements from BA-NJ pursuant to section 251 of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56, codified in scattered sections of 47 U.S.C. $151 et seq. (hereinafter, the Act). During the period from the 135” to the 160th day after receipt of an interconnection request, the carrier or any other party to the negotiation may petition the State commission to arbitrate any outstanding issues. The State commission is required to resolve each issue set forth in any such proceeding “not later than 9 months after the date on which the local exchange carrier received the [interconnection] request under this section.” 47 U.S.C. §252(b)(4)(C).

By letter dated June 30, 1998 and pursuant to section 252(b)(1) of the Act, GNI filed with the Board of Public Utilities (Board) a Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Relief. GNI essentially sought affirmation through the arbitration process that it was entitled to opt into an interconnection agreement previously approved by the Board between BA-NJ and MFS Intelenet of New Jersey, Inc. (MFS)[1], and to do so without any limitations or restrictions which it believed BA-NJ improperly sought to impose. By letter dated July 16, 1998, GNI advised the Board that it believed that the parties had reached an agreement for interconnection, had apparently resolved the issues raised in the petition, and requested that the Board suspend further action on the petition for arbitration pending successful execution of an interconnection agreement

The parties having failed to reach an interconnection agreement, and pursuant to the Boards arbitration procedures,2 on September 15, 1998, Ashley C. Brown from the Kennedy School of Government at Harvard University was chosen as the Arbitrator. On September 28, 1998, both parties submitted a joint statement of the unresolved issues to the Arbitrator and each party separately submitted a statement of their response to these issues. By letter dated October 2, 1998, the parties jointly submitted a letter to the Board stating that they had agreed not to file any motions with the Federal Communications Commission (FCC) for preemption of state jurisdiction for twenty days after the expiration of the nine-month time limit imposed by the Act. Notwithstanding the efforts of Board Staff and the Arbitrator to facilitate a mutually acceptable agreement, on October 20, 1998, each party separately submitted updated statements to the Arbitrator of the unresolved issues to be decided. By Order dated October 21, 1998 in this Docket, William J. Rooney, Esq., General Counsel for GNI, and Christopher W. Savage, Esq., were granted leave to appear pro hac vice on behalf of GNI, and Robert A. Lewis, Esq., was granted leave to appear pro hac vice on behalf of BA-NJ.

On October 21, 1998, an arbitration hearing was held in Boston, Massachusetts. Post-hearing briefs were submitted on October 23, 1998. The Arbitrator issued a decision which he termed a "Recommended Interim Final Decision" on October 26, 1998 (hereinafter, the Arbitrator's Decision).

The Arbitrator recast the submitted issues into six issues and resolved them in the following manner:

(1) Is GNI an entity eligible for an interconnection agreement?

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[1] See Order Approving Interconnection Agreement, I/M/O the joint Petition of Bell Atlantic-New Jersey, Inc. and MFS ntelenet of New Jersey, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 and I/M/O the Bell Atlantic-New Jersey, Inc. Interconnection Agreement with MFS Intelenet of New Jersey, Inc. Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996, Docket Nos. TO96070527 and TO96070526 (March 10, 1997).

[2] See Order, I/M/O The Board's Consideration of Procedures for the Implementation of Section 252 of the Telecommunications Act of 1996, Docket No. TX96070540 (August 15, 1996) (hereinafter, Arbitration Order).

Meanwhile, on the federal level, the FCC was already engaged in its consideration of the issue of whether reciprocal compensation was the appropriate form of compensation for ISP-bound traffic. On October 30, 1998, the FCC issued a Memorandum Opinion and Order in GTE Telephone, GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, FCC 98-292 (October 30, 1998) (hereinafter, GTE Telephone). In GTE the FCC concluded an investigation of an access offering by the GTE Telephone Operating Companies, and found that GTE's offering, which would permit Internet Service Providers to provide their end-user customers with high-speed access to the Internet, was an interstate service properly tariffed at the federal level. GTE Telephone at ¶1. T E Telephone, FCC expressly stated that its *Order* did "not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit switched dial-up traffic originated by interconnecting LECs." Id. at ¶2. The FCC stated instead that it intended "in the next week to issue a separate order specifically addressing reciprocal compensation issues." Ibid. Thereafter, the Board, along with much of the telecommunications community, waited with great anticipation for further word from the FCC on the issue of compensation for ISP-bound traffic.

With regard to the Arbitrator's Decision, and as required in the Board's Arbitration Order, the parties were required to submit for Board consideration a fully executed interconnection agreement encompassing the arbitration decision within five (5) days of the Arbitrator's decision. On *November* 2, 1998, GNI tiled a motion requesting that the Board issue an order to the effect that:

> (a) [GNI] is for all purposes deemed to have entered into an interconnection agreement with BA that reflects the [Arbitrator's Decision], with an effective date of today, November 2, 1998; and (b) to the extent that BA's actions in any way delay the date on which [GNI] can begin exercising its rights under the agreement, the termination date of the agreement is deemed extended, day for day, during the period that BA continues to engage in such delaying efforts.
>
> [November 2, 1998 Motion of GNI at 2, 10].

GNI attached a form of interconnection agreement, executed by GNI, which purports to incorporate the Arbitrator's Decision.,

At its public meeting of November 4, 1998, the Board authorized its Secretary to send a letter to the parties advising them of their duties to submit a mutually executed agreement for Board consideration. The Secretary's letter was sent the same day. By letter dated November 5, 1998, GNI responded to the Board referencing its November 2, 1998 Motion and asking that the Board, in addition to the other relief requested, direct that BA-NJ pay to GNI reasonable incurred attorney’s fees in connection with GNI’s efforts to reach an agreement with BA-NJ during the period November 2-5, 1998. On November 5, 1998, BA-NJ submitted two versions of interconnection agreements. The first modified the GNI agreement previously submitted to the Board by GNI on November 2, 1998. The second contains modifications to the original MFS agreement based on BA-NJ's interpretation of the Federal Communications Commission (FCC) Memorandum Opinion and Order in GTE Telephone, GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, FCC 98-292 **(October 30, 1998)** (hereinafter, GTE Telephone). At the same time, BA-NJ submitted its Opposition to GNI’s Motion. By letter dated November 6, 1998, GNI filed an answer BA-NJ’s Opposition to its Motion. By letters dated November 10, 1998 and November 12, 1998 BA-NJ and GNI, respectively, submitted additional responsive papers. BA-NJ submitted additional comments by letter dated November 19, 1998, to which GNI responded by letter dated November 20, 1998.

By letter dated November 18, 1998, the Division of the Ratepayer Advocate (Advocate) submitted comments on the Arbitrator’s Decision and noted the fact that the Board had before it three forms of interconnection agreements submitted by the parties. In its letter, the Advocate disagreed with the Eighth Circuit Court of Appeals rejection of the FCC’s “pick and choose” rule’ and the Board’s adoption of the Eighth Circuit’s interpretation. Nevertheless, the Advocate supported an interconnection agreement as recommended by the Arbitrator, and urged the Board to approve the interconnection agreement which in effect would reflect the MFS agreement. By letter dated November 25, 1998, BA-NJ responded to the Advocate’s comments and stated that the Board should not approve an interconnection agreement based on the Arbitrator’s Decision, but should find that the MFS agreement which GNI seeks to adopt must contain rates which conform to the Boards December 2, 1997 Generic Order in Docket No. TX95120631 and should extend for a term which expires on July 1, 1999, the termination date of the MFS Interconnection Agreement. In addition, BA-NJ stated that the Board should clarify that, pursuant to the FCC’s determination in GTE Telephone, Internet traffic is jurisdictionally interstate. By letter dated December 1. 1998, GNI disagreed with BA-NJ and stated that the FCC’s analysis in GTE Telephone did not affect the proper treatment of reciprocal compensation for ISP-bound traffic. As of the date of this Order, the Parties have failed to mutually execute a comprehensive interconnection agreement based on their continuing differences in interpreting the Arbitrator’s Decision and FCC Orders.

Finally, on February 26, 1999, the FCC released its Declaratory Order in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, I/M/O Implementation of the Local Compensation Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, FCC 99-38 (February 26, 1998) (hereinafter, Declaratory Ruling). In the Declaratory Ruling, the FCC advised that it considered ISP-bound traffic to be interstate traffic not subject to the reciprocal

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[3] See Iowa Utilities Board v. FCC, 120 F.3d 753,800 (8th Cii. 1997); aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd., __ U.S. __, 119 S.Ct. 721,142 L.Ed.2d 835 (1999).

compensation obligations imposed by section 251(b)(5) of the Act, Declaratory Ruling at ¶¶1, 18, 27 and fn 87, and advised further that, in the absence of a federal rule governing inter-carrier compensation for such traffic, states are free either to impose. or not impose reciprocal compensation for ISP-bound traffic, depending upon the circumstances before the state commission, including the existence of interconnection agreements, Declaratory Ruling at ¶¶1, 21, 25-27.

DISCUSSION

With regard to the first issue recited above, we FIND that the Arbitrator correctly determined that GNI is eligible to enter into an interconnection agreement. We note that at its public agenda meeting of June 9, 1999, the Board found that GNI had demonstrated that it possessed the requisite financial, technical and managerial expertise and resources which are necessary to provide local exchange and exchange access telecommunications services in New Jersey, and accordingly, the Board authorized GNI to provide local exchange and exchange access telecommunications service in New Jersey subject to the approval of its interconnection agreement and tariffs. See Order of Approval, I/M/O the Petition of Global NAPs, Inc. For a Certificate of Public Convenience and Necessity to Provide Local 'Exchange Telecommunications Services, Docket No. TE98060386 (June 21, 1999). Accordingly, we agree with the Arbitrator that GNI is an entity eligible for an interconnection agreement.

We also FIND that the Arbitrator is correct that as an approved local exchange carrier, GNI is entitled to opt into a pre-existing interconnection agreement through the so-called "most favored nation," or "MFN," process pursuant to section 252(i) of the Act. With regard to the third issue, subsequent to the Arbitrator's Decision, the Supreme Court reinstated47 C.F.R. §5 1.809, allowing carriers to "pick and choose" parts of interconnection agreements, as well as opt into an entire agreement through the MFN process.' See AT&T Corn v. Iowa Utils. Bd., __ U.S. __, 119 S.Ct. 721, 738, 142 L.Ed.2d 835 (1999). Thus, we MODIFY the Arbitrator's Decision to comport with the Supreme Court decision with regard to the FCC's reinstated "'pick and choose" rule.

We next turn to the fourth issue which confronted the arbitrator, the duration of the interconnection agreement created as a result of GNI opting into the terms and conditions of the MFS agreement. At the outset, we note that the FCC is currently seeking comment on just the situation that faced the Arbitrator in the matter now before the Board. In its February 26, 1999 Declaratory Ruling in CC Docket No. 96-98, the FCC noted that an arbitrator recently allowed a CLEC to opt into an interconnection agreement with a three year term for a new three year term, raising the possibility that an ILEC "might be subject to the obligations set forth in [the original] agreement for an indeterminate length of time, without any opportunity for renegotiation, as successive CLEC's opt into the agreement." Declaratory Ruling at ¶35. The FCC, therefore, is seeking comment on "whether and how section 252 (i) and MFN rights affect parties' ability to negotiate or renegotiate terms of their interconnection agreements." Ibid.

Because the Board is also concerned about the procedural and substantive rights of both ILECs and CLECs involved with the MFN and "pick and choose" processes, the Board HEREBY DIRECTS its Staff to prepare a rulemaking pre-proposal which will elicit ideas, views and comments from the industry regarding these issues. Of more immediate import, we note our preliminary belief that interconnection agreements should not exist into perpetuity without a right to have such agreements reviewed and renegotiated. Thus, on an interim basis, and subject to possible reexamination based upon the pending FCC and Staff actions noted above, we indicate herein our view that any existing agreement MFN'd by a CLEC should extend for a period of time equal to the remaining term of the original MFNU agreement or one (1) year, whichever is greater. We further note our preliminary view that an original interconnection agreement may only be MFN'd during the original term of the agreement, and that once MFN'd for the additional term just noted, neither the original interconnection agreement nor the subsequent interconnection agreement may be subject to further adoption by any CLEC through the MFN process. This preliminary general view notwithstanding, however, we note that parties may, through negotiation, agree to adopt rates, terms and conditions which are identical to those contained in any other interconnection agreement and for a term of any length which they mutually desire. We stress that these are preliminary views which we fully expect to be commented upon by the industry in the context of both the FCC's and our own rulemaking processes.

We note also that the FCC has already expressed its view regarding how a carrier seeking interconnection, network elements or services pursuant to section 252(i) should proceed. The FCC has advised that such a carrier "need not make such requests pursuant to the procedures for initial section 251 requests, but shall be permitted to obtain its statutory rights on an expedited basis.!!, First Report and Order, I/M/O Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325 (August 8, 1996) at ¶1321. The FCC has also stated that it "leave[s] to state commissions in the first instance the details of the procedures for making agreements available to requesting carriers on an expedited basis." Ibid. In this regard, we remind carriers that the Board has already adopted a dispute resolution process which is made available expressly to resolve on an expedited basis petitions by carriers related to service-affecting issues and assertions ofanti-competitive conduct, and is an appropriate means to resolve section 252(i) disputes. See Order on Reconsideration, I/M/O the Investigation Regarding Local Exchange Competition for Telecommunications Services, Docket No. TX95120631 (June 19, 1998).

With specific regard to the interconnection agreement between GNI and BA-NJ, however, we do not believe that the general view we have just announced regarding the duration' of interconnection agreements adopted through the MFN process is necessarily appropriate. The GNI/BA-NJ Arbitrator rendered his decision on October 26, 1998. According to our arbitration guidelines, the parties should have submitted an intercorinection agreement to the Board for its review within five (5) days thereafter. On November 2, 1998, GNI filed a motion requesting that the Board issue an order providing that the interconnection agreement between GNI and BA-NJ attached to its motion and based upon the MFS interconnection agreement shall be deemed effective on November 2, 1998, and extended day to day thereafter for every day that BA-NJ delays in signing the attached agreement. Not including any such extensions, GNI's proposed interconnection agreement incorporated a termination date of October 14, 2001, 19 days less than three years, as approved by the Arbitrator's Decision.

We have already indicated above our preliminary view that an interconnection agreement which is adopted through the MFN process should extend for a term no less than 12 months. However, as noted above in the within matter, the parties, including the Advocate, continued to file comments on the Arbitrator's Decision through the month of November, 1998, the last submission being by GNI on December 1, 1998, and the Board delayed the decision on this arbitration further while it awaited the FCC's expected determination of the issue of the nature of ISP-bound traffic. In order not to penalii GNI for delay not caused by it, we HEREBY ADOPT a term which reflects the minimum one year term of an MFN'd agreement, and in addition reflects the delay which occurred from December 1, 1998 until July 7, 1999, a period of 219 days. Accordingly, we FIND that a term of one year and 219 days, or slightly more than 19 months, is appropriate in this case. Assuming that a signed interconnection agreement which conforms to our Decision is submitted within five (5) days of the date of this Order and is approved at the Board's July 26, 1999 public meeting, this interconnection agreement will therefore terminate one year and 219 days from July 26, 1999, or March 2, 2001. Because the Decision we make herein rests upon the unique nature of the circumstances surrounding the parties and this interconnection agreement, the Board believes that it is not in the public interest to permit this agreement to be adopted through the MFN process.

With regard to the fifth issue, whether calls to ISPs are eligible for reciprocal compensation under the MFS interconnection agreement; we must begin our analysis by noting again the FCC's most recent declarations regarding ISP-bound traffic. In its October 30, 1998 GTE Telephone Memorandum Opinion'and Order, the FCC presaged its later declaration that ISP-bound traffic is interstate in character by concluding that a high speed Internet access offering by the GTE Telephone Operating Companies, was an interstate service properly tariffed at the federal level. GTE Telephone at ¶1. While the FCC expressly stated that its Order did "not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit switched dial-up traffic originated by interconnecting LECs," it did state that it intended "in the next week to issue a separate order specifically addressing reciprocal compensation issues." Id. at 2.

On February 26, 1999, the FCC finally released its Declaratory Ruling, concluding that ISP-bound traffic is largely interstate; but "[i]n the absence, to date; of a federal rule regarding the appropriate inter-carrier compensation for this traffic, we therefore conclude that parties should be bound by their existing interconnection agreements, as interpreted by state commissions." Declaratory Ruling at ¶1. The FCC stated that the reciprocal compensation obligations imposed by section 25 1 (b)(5) of the Act apply only to the transport and termination of local telecommunications traffic. Id. at ¶7. Continuing its tradition of determining the jurisdictional nature of communications by reference to the end points of the communication, the FCC stated that a substantial portion of ISP-bound traffic is interstate because “the communications at issue do not terminate at the ISP’s local server, but continue to the ultimate destination or destinations, specifically at a Internet website that is often located in another state.” Id. at ¶¶10-18. The FCC advised that “pending adoption of a rule establishing an appropriate interstate compensation mechanism,” it found “no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic.” Id. at ¶21. The FCC further advised the following:

> [i]n the absence of a federal rule, state commissions that have had to fulfill their statutory obligation under section 252 to resolve interconnection disputes between incumbent LECs and CLECs have had no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation. Although reciprocal compensation is mandated under section 251(b)(5) only for the transport and termination of local traffic, neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances not addressed in section 252(b)(5), so long as there is no conflict with governing federal law. A state commission’s decision to impose reciprocal compensation obligations in an arbitration proceeding -- or a subsequent state commission decision that those obligations encompass, ISP-bound traffic -- does not conflict with any Commission rule regarding ISP-bound traffic. By the same token, in the absence of governing federal law, state commissions are also free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism.
>
> [Id. at ¶26 (footnotes omitted].

The FCC asserted that the adoption of rules governing inter-carrier compensation for ISP-bound traffic would serve the public interest, and proposed rules which, in the first instance, would rely on commercial negotiations as the ideal means to establish the terms of interconnection arrangements, id. at ¶28, but might also rely on arbitration on the state or even federal level, id. at ¶¶30-32.

The FCC recognized that its conclusion that ISP-bound traffic is largely interstate might cause some state commissions to reexamine conclusions that reciprocal compensation is due from ILECs to CLECs which carry this traffic to the extent that those conclusions are based on a finding that ISP-bound traffic terminates at an ISP server. Id. at ¶27. In fact, that has already occurred. In Complaint of MCI WorldCom, Inc. against New England Telephone and Telegraph Companv d/b/a Bell Atlantic-Massachusetts for Breach of Interconnection Terms Entered into under Sections 251 and 252 of the Telecommunications Act of 1996, D.T.E. 97-116-C (May 19, 1999) (hereinafter, Complaint of MCI WorldCom), the Massachusetts Department of Technology and Energy (Mass. DTE) reversed an earlier decision in which it determined that RIP-bound traffic was local based upon its understanding that such traffic was severable into two components, one call terminating at the ISP, and another call connecting the ISP to the target Internet website. Complaint of MCI WorldCom, Summary. The Mass. DTE stated that, in light of the Declaratory Ruling, the basis for its earlier decision had crumbled and that decision was now a "nullity," and "[u]nless and until modified by the FCC itself or overturned by a court of competent jurisdiction, the FCC's view of the 1996 Act must govern this Department's exercise of its authority over reciprocal compensation" Complaint of MCI WorldCom at 19-3TE ruled that "[r]eciprocal compensation need not be paid for terminating ISP-bound traffic (on the grounds that it is local traffic), beginning with (and including payments that were not disbursed as of) February 26, 1999." Ibid.

In determining whether reciprocal compensation obligations apply to ISP-bound traffic which GNI will carry, the Board does not have the benefit of earlier arbitrations which have addressed this issue, nor was the issue addressed in the Board's Generic Proceeding. See Decision and Order, Exchathe Investigation Reeardine Local e Competition for Telecommunications Services, Docket No. TX9512063 1 (December 2, 1997). Although the MFS interconnection agreement was the result of both negotiations and arbitration, the reciprocal compensation issue was decided wholly through negotiations between MFS and BA-NJ. Section 5.7 of the MFS/BA-NJ agreement provided for reciprocal compensation for the transport and termination of local traffic, defined in section 1.44 of the agreement as "traffic that is originated by a Customer of one Party on that Party's network and terminates to a Customer of the other Party on that other Party's network, within a given local calling area, or expanded area service ('EAS') area, as defined in BA's effective Customer tariffs." The negotiations which led to the adoption of these provisions occurred well before the FCC's declaration that ISP-hound traffic was interstate, a significant change in the law not known to either party to the negotiations and not reflected in the interconnection agreement which GNI desires to MFN.[4] The Board notes well the FCC's statements that in the absence of a federal rule regarding inter-carrier compensation for ISP-bound traffic, "parties should be bound by their existing interconnection agreements, as interpreted by state commissions." Declaratory Ruling at ¶1. In this case, however, the Board does not have an existing interconnection agreement between GNI and BA-

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[4] We note, however, that pursuant to section 28 of the MFS agreement, FCC action or other legal developments which require modification of material terms contained in the agreement allows either Party to require a renegotiation of the terms that are reasonably affected by the change in the law. Thus, even were we not to exclude ISP-bound traffic from reciprocal compensation provisions of the agreement at this time, we conclude that section 28 of the MFN'd agreement could soon lead to the same result which the Board herein reaches.

NJ to interpret. Because of GNI's right to MFN an existing interconnection agreement, we FIND that it is appropriate to apply to GNI and BA-NJ the rates and terms in the existing MFS agreement which GNI desires to MFN with respect to reciprocal compensation obligations for traffic which is truly local. ISP-bound traffic, as determined by the FCC, is interstate in character, and, therefore, in the Board's view, is not entitled to reciprocal compensation. All other local traffic carried by GNI shall be subject to reciprocal compensation at the negotiated rates in the MFS interconnection agreement, that is $0.009 for local traffic delivered to a tandem switch and $0.007 for local calls delivered to an end office.

We expect that GNI will be compensated by its end user customers and/or by ISPs themselves for the ISP-bound traffic which it carries. Nevertheless, the Board is mindful of the FCC's ongoing rulemaking with regard to the appropriate form of inter-carrier compensation mechanism for ISP-bound traffic. We assure carriers that the Board shall review the FCC's ultimate ruling regarding such compensation and take appropriate action, as needed. Of course, the parties themselves are not foreclosed from further negotiations to develop more appropriate forms of compensation.

Accordingly, to clarify the last issue decided by the Arbitrator, the Board herein FINDS that the MFS interconnection agreement rates for reciprocal compensation, and not the Board's generic rates, shall apply to the interconnection agreement *between the* parties. The Arbitrator found that negotiated rates took precedence over rates determined by either regulation or by arbitration. Accordingly, he determined that the rates for reciprocal compensation negotiated by and between MFS and BA-NJ are applicable to the local traffic exchanged between GNI and BA-NJ. The Board agrees with the Arbitrator in this regard, but clarifies that the MFS interconnection agreement rates do not apply-to the ISP-bound traffic carried by GNI since that traffic is interstate traffic pursuant to the FCC's Declaratory Ruling.

In conclusion, the Board FINDS that the resolution of all open arbitration issues set forth above and the conditions imposed herein upon the parties is consistent with the public interest and in accordance with law. The Board HEREBY APPROVES an interconnection agreement between the parties which is the same as the MFS agreement referenced above, as modified herein, as meeting the requirements of the Act for agreements which are in part negotiated and in part arbitrated. The Board **DIRECTS** the Parties to submit to the Board for its approval a fully executed interconnection agreement reflecting the decisions set forth herein within five (5) business days of the date of this Order.

DATED: 01/29/99

BOARD OF PUBLIC UTILITIES
BY:

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PRESIDENT

CARMEN J. ARMENTI
COMMISSIONER

FREDERICK F. BUTLER
COMMISSIONER

ATTEST:

MARK W. MUSSER
SECRETARY

In the Matter of the Petition of Global NAPs, Inc.
For Arbitration of Interconnection Rates, Terms, Conditions
and Related Arrangements with Bell Atlantic-New Jersey, Inc.
Pursuant to Section 252(b) of the Telecommunications Act of 1996
BPU Docket No. TO98070426

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